IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

SUMMONS FOR JUDGMENT NO. 91 OF 2007
IN
SUMMARY SUIT NO.597 OF 2004

Dena Bank ..Plaintiff.
Vs.
Shantinath Enterprises & Ors. ..Defendants.

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Mr. P.J.Pandit i/b B.M. Gupta & Associates for the Plaintiff.
Mr. L.C. Joshi for Defendant No.2.

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CORAM: **DR. D.Y. CHANDRACHUD, J.**

9th April, 2007.

P.C. :

1. The suit under Order 37 of the Code of Civil Procedure 1908 has been instituted for the recovery of an amount of Rs.6,89,501.15 together with further interest on the principal sum of Rs.4,84,380/-. The suit is founded on an on demand promissory note executed by the Defendants in the amount of Rs.5 lacs, for value received with interest at the rate of 4.08 % above the prime lending rate with a minimum of 16% per annum. A letter of guarantee together with an acknowledgment of liability dated 3rd January, 2000

and 25th July, 2003 have been executed (Exhibits H and K).

2. The Defendants have been served with the writ of summons. The First and Third Defendants have not entered appearance. The Fourth Defendant has not filed any reply to the Summons for Judgment though he has entered appearance through an advocate. In the circumstances, a decree shall have to be passed in terms of the provisions of Order 37 and is accordingly passed against Defendants 1, 3 and 4 in terms of prayer clauses (a) and (b).

3. In so far as the Second Defendant is concerned, the defence that has been raised is purely of a technical nature. The Second Defendant is a partner. The principal ground of defence is that the Summons for Judgment was taken out on 7th February, 2007 though the suit was instituted on 21st January, 2004. In paragraph 5 of the affidavit in support of the Summons for Judgment the delay in taking out the Summons for Judgment has been explained on the ground that the office of the advocate was under repair and the proceedings in the suit were lost/ misplaced as a result of which the

advocate could not follow up the matter. Be that as it may, all that Rule 227 of the High Court (Original Side) Rules provides is that if the Plaintiff does not apply for a decree within six months after filing of the plaint, the suit shall be set down for dismissal on the Board of the Judge in Chambers. Rule 227 does not mandate that in every case, the suit shall be dismissed where the Summons for Judgment has not been taken out within a period of six months. Rule 227 essentially recognizes the inherent jurisdiction of the Court to either dismiss the suit in the event that the Summons for Judgment has not been taken out within a period of six months, or to allow the Plaintiff to pursue the proceedings subject to such order as the Court may pass. In any event, in a case such as the present it is impossible to perceive as to how any prejudice has been suffered by the Second Defendant as a result of the delay on the part of the Plaintiff in instituting the Summons for Judgment.

4. In the affidavit in reply dated 2nd April, 2007, it has been submitted that the Summary Suit is not maintainable. There is no merit in the defence having regard to the promissory note and

acknowledgment of liability executed on behalf of the Defendants. In these circumstances, the defence on the part of the Second Defendant is totally lacking any credibility. The suit shall accordingly have to be decreed as against the Second Defendant and is accordingly decreed in terms of prayer causes (a) and (b). This shall, however, be subject to the modification that the Plaintiff will be entitled to interest at the rate of 9% per annum from the date of the institution of the suit until the date of the decree and at the same rate from the date of the decree until payment or realization.

Refund of Court Fess, if any, as per rules.